Supreme Court, U. S.
FILED
FEB 7 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-871

PRESTIGE LINCOLN-MERCURY, INC., N. GROSSMAN and H. I. GROSSMAN,

Petitioners,

vs.

QUALITY MERCURY, INC., FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Respondents.

PETITIONERS' REPLY BRIEF

HAROLD D. FIELD, JR.
CHARLES A. MAYS
1200 National City Bank Building
Minneapolis, Minnesota 55402
Counsel for Petitioners

Of Counsel:
LEONARD, STREET AND DEINARD
Minneapolis, Minnesota

1977—Northwest Brief Printing Co., 316 Chicago Avenue, Minneapolis 55415—338-5078

TABLE OF CONTENTS

	Page
Argument:	
I. Impact of Court of Appeals' decision	1
II. Ripeness for review	4
III. Geographcial area and duration	4
IV. Petitioners' "veto" right	7
Conclusion	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-871

PRESTIGE LINCOLN-MERCURY, INC., N. GROSSMAN and H. F. GROSSMAN,

Petitioners,

vs.

QUALITY MERCURY, INC., FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Respondents.

PETITIONERS' REPLY BRIEF

I.

IMPACT OF COURT OF APPEALS' DECISION

In an apparent effort to limit the importance of the Court of Appeals' decision, and thereby reduce the chances that this Court will be interested in reviewing it, Respondents argue that the decision will have no impact on the "normal" exclusive franchise and that Petitioners' claim to the contrary is based on an "overly broad" construction of the decision. (Ford Br. pp. 8, 10; Quality Br. p. 8).[1] This argument is based on the erroneous assump-

---

[1]Respondent Quality Mercury, Inc. is referred to throughout this brief as "Quality" and its Brief in Opposition is cited as "Quality Br. p.—." Respondents Ford Motor Company and Ford Marketing Corporation are referred to collectively as "Ford" and their Brief in Oppsition is cited as "Ford Br. p.—."

tion that a "normal" franchise is one granted *unilaterally* by a manufacturer solely in the exercise of his independent judgment. (Ford Br. p. 8; Quality Br. pp. 7, 8). However, contrary to this assumption, the "normal" exclusive franchise agreement comes into being as the result of a *bilateral* agreement, usually sought by the franchisee. (Petition pp. 11-13). It certainly cannot be said that either Packard or Hudson acted unilaterally, when at the request of one established dealer, they each terminated other locally competitive dealers and granted the exclusives validated in *Schwing* and *Packard*.[2] Nowhere in their briefs do respondents suggest that the Court of Appeals' decision is not applicable to such bilateral arrangements. To the contrary, Quality argues (Quality Br. p. 8) and the Court of Appeals decision mandates (Petition, Appendix C, pp. A16-20) that such bilateral agreements are subject to being tested at trial under the rule of reason. The Court of Appeals' decision is, therefore, clearly applicable to the "normal" exclusive franchise.

Respondents also claim that the impact of the Court of Appeals' decision is limited by the "unique" and "unusual" allegations contained in Quality's complaint. These so-called "unique" and "unusual" allegations relate to Petitioners' claimed right to "veto" horizontal competitors in the Minneapolis market and the geographic breadth and

[2]The fact that the terminated dealers in *Packard* and *Schwing* were in existence is evidence that Packard and Hudson believed the Baltimore market "needed" more than one Hudson and Packard dealer. Neither this fact nor the fact that the initiative came from the surviving dealers precluded summary disposition in *Schwing* or the reversal of the judgment for plaintiff in *Packard*. Quality's attempt to limit *Packard* and *Schwing* to failing or weak companies (Quality Br. pp. 16-17) has already been dealt with. (Petition p. 15 n. 20).

duration of the exclusive in the case at bar.[3] (Ford Br. p. 8; Quality Br. pp. 8, 9, 14, 15). However, as pointed out in Part IV of this Brief, there is nothing "unique" or "unusual" about Petitioners' claimed "veto" power. It is, in reality, nothing more or less than the exercise of the right granted to every exclusive franchisee to prevent the manufacturer from breaching that agreement by opening a second franchise in the territory reserved by the franchise agreement exclusively to it. In addition, there is nothing "unique" or "unusual" about Quality's geographic breadth and duration allegations. As pointed out below (*infra*, Point III), the differences between a franchise covering the "Minneapolis area" and one limited to any stated smaller area, and a franchise of perpetual or indefinite duration and one limited to any shorter stated period of years, are differences of degree, not of kind. The effect of the Court of Appeals' ruling is that, whatever the duration or geographic area covered by the franchise agreement, that agreement is subject to review under the rule of reason when it is alleged that it is unreasonable in the light of current market conditions. That holding cannot be limited to the peculiar facts of the case in which it was announced. It's application to all exclusive franchise agreements is clear.[4]

[3]Quality also claims that the present exclusive is unreasonable because there is no business justification for it. (Quality Br. p. 8). However, the presence or absence of business justification is irrelevant in determining the reasonableness of an exclusive. (Petition p. 16). The antitrust laws were not calculated to convert the federal judiciary into a super business tribunal to review the reasonableness of the multitude of business considerations that go into the decision of a manufacturer to deal with one customer to the exclusion of another.

[4]Ford acknowledges that if the decision does in fact have an impact on all exclusive franchise agreements, it too would urge this Court to review that decision. (Ford Br. p. 7).

II.

RIPENESS FOR REVIEW

Ford's claim that this case is presently only "interlocutory" and not "ripe" for review (Ford. Br. p. 6) is plainly wrong. The Petition seeks review of the grant of a judgment on the pleadings. That decision ended the litigation on the merits and was a "final," not "interlocutory," decision. Rule 54(a), Federal Rules of Civil Procedure; *Catlin v. United States*, 324 U.S. 229, 233 (1945). Under Ford's theory, the question of the sufficiency of Quality's pleadings would never be ripe for review since, after a trial on the merits, the decision on the motion for judgment on the pleadings would be moot. 5 Wright & Miller, *Federal Practice and Procedure* §1372, p. 707. It is only in the procedural context of this case that this Court can ever resolve the right, *vel non*, of an unsuccessful franchise applicant to litigate the reasonableness of the refusal to grant him a franchise when he has pled nothing more than Quality has in the case at bar. Confronted with an ever-increasing backlog of cases, the District Courts need guidance on the question whether such cases may be summarily disposed of or must be docketed for trial on the merits. The instant case is an appropriate vehicle for this Court to provide such guidance.

III.

GEOGRAPHICAL AREA AND DURATION

Quality claims that Petitioners assert that exclusives are legal regardless of the circumstances. (Quality Br. p. 14). This, of course, is not true. Petitioners do claim, however, as this Court ruled in *Schwinn*, that an antitrust claimant

must allege "something more" than a vertical exclusive dealing arrangement to state a claim and that Quality's allegations of overly broad geographical area and unreasonably long duration, uncoupled with an allegation of anticompetitive abuses claimed to have flowed therefrom, is not the "something more" required by *Schwinn*.

Respondents have cited no court decisions, and Petitioners are aware of none, which hold that an otherwise lawful exclusive franchise is rendered unlawful because it has become unreasonable in size or duration.[5] Having found no decisions supporting their position, respondents seek to undermine the avalanche of precedent validating exclusive franchises by arguing that in none of those cases was the franchise as broad in geographical area or as long in duration as the one in the case at bar.[6] Even if that were true, the differences between a franchise covering the

[5]Nothing in *Chicago Board of Trade* deals with the duration of an exclusive, the proposition for which it was cited by Quality (Quality Br. p. 18). *Chicago Tribune*, cited by Quality in connection with its geographical breadth argument (Quality Br. p. 20), did hold that, because of the geographical breadth of the exclusives granted in that case, there was a real danger that significant portions of the public would be denied access *altogether* to the features of the Tribune. (309 F. Supp. at 1308). However, no such allegation is made in the case at bar. Quality's claim is not that a portion of the purchasing public is being denied access to the Lincoln line altogether, but rather that the public is injured by having only one rather than two Lincoln dealers to make their purchases from.

[6]The franchises validated in *Schwing* and *Packard* were as broad in geographical scope as the one in the case at bar. In its attempt to bolster its claim that the exclusive was "perpetual," Quality has appended to its brief two Ford interoffice memoranda. (Quality Br. p. 5 n. 14). This excursion outside the record proves too much. It shows that the limitations in the 1962 letter (Ford Br. p. 3 n. 1) were actually being policed by Ford. It also shows that the 1962 agreement was granted in the first place, not because Ford was an instrumentality of Petitioners, but as an inducement to get Petitioners to accept and invest in a failing franchise. Quality nowhere contends that the initial grant of the exclusive was the result of anything other than arms-length bargaining.

"Minneapolis area" and one limited to a ten-mile radius, and a franchise of perpetual or indefinite duration and one limited to a period of years, are differences of degree, not of kind. If it is true, as respondents contend, that it is a question of fact whether the "Minneapolis area" is overly broad, why isn't it also a question of fact whether the 10-mile radius specified in the standard Ford franchise agreement (Ford Br. p. 5; Quality Br. p. 17) or any other stated geographical limitation in any franchise agreement is also overly broad in the light of current market conditions? If it is true, as respondents contend, that the grant of a franchise of indefinite or perpetual duration raises a question of fact concerning the reasonableness of the duration of the franchise, why isn't it also a question of fact whether the two-year term Quality conceded to be reasonable (Quality Br. p. 18) or any other arbitrary time limitation in any franchise agreement is reasonable in the light of current market conditions?[7] Such a result is mandated by the Court of Appeals' decision. If that is the law, every unsuccessful applicant for a franchise can allege an antitrust violation and secure a trial on the merits. Petitioners

[7]A so-called "perpetual" franchise will, at any given point in time, have been in effect for a time certain. When it has been in effect for two years, for example, it is difficult to perceive how its impact on competition differs from a two-year franchise, particularly when the two-year franchise, as is usually the case, is renewable indefinitely. That the so-called "standard" two-year automobile franchise which Quality holds up as a model of reasonableness (Quality Br. p. 18) is also a franchise of indefinite duration is evident from the fact that Quality's Mercury exclusive has remained in effect since 1968 (Quality Br. p. 3), only six years less in duration than Petitioners' Lincoln exclusive. Under Quality's theory, a person denied a Mercury franchise today within ten miles of Quality's facility would be entitled to a trial on the merits on the question of the reasonableness of the 10-mile radius limitation and the duration of the franchise, which has been in effect since 1968. Quality would then no doubt agree with Petitioners that something more is required to state an antitrust violation.

submit it is not the law. While it may be true that the potential for abuse may be greater where the duration of the franchise is longer and the geographical area covered is broader, it is the abuse which is prohibited, and not merely the potential for abuse. Unless and until that abuse becomes manifest, by price fixing or monopolization, for example, the "something more" required by *Schwinn* does not exist and the agreement is lawful. Quality has pled neither price fixing nor monopolization nor any other abuse claimed to have resulted from the franchise granted to Petitioners. For this reason, the Court of Appeals was required to sustain the trial court's grant of judgment on the pleadings.

IV.

PETITIONERS' "VETO" RIGHT

Quality claims that Petitioners, in their sole discretion, determine if the Minneapolis market will have a second Lincoln franchise (Quality Br. p. 9) and, using this premise as a springboard, argues that the exercise of this right is, in effect, a "veto" over the entry of a horizontal competitor of the sort condemned in *Topco* and *American Motor Inns*. (Quality Br. pp. 10-14). The Court of Appeals bought this argument hook, line and sinker. (Petition, Appendix C, p. A-21). As noted in the Petition, however, every exclusive franchise gives the franchisee the right to exclude horizontal competitors. (Petition p. 17). If it didn't, the "exclusive" feature of the agreement would be purely illusory. If the Court of Appeals' decision is permitted to stand, every franchisee who merely seeks to enforce the "exclusivity" of his agreement can be accused of exercising such a "veto" and, therefore, of violating the antitrust laws.

The multitude of cases cited in the Petition demonstrate that this is not the law, at least outside of the Eighth Circuit.

CONCLUSION

Petitioners submit that, for the reasons stated in their Petition, a writ of certiorari should be granted to resolve the important questions of Federal law involved in this case and the conflict that exists between the decision of the Court of Appeals in the case at bar and prior decisions by this Court and other Courts of Appeals.

Respectfully submitted,

HAROLD D. FIELD, JR.
CHARLES A. MAYS
1200 National City Bank Building
Minneapolis, Minnesota 55402
Counsel for Petitioners

Of Counsel:
LEONARD, STREET AND DEINARD
Minneapolis, Minnesota
February 1977.